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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PORT CLINTON FISH COMPANY

PETITIONER

VS.

THE STATE OF OHIO

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE SUPREME COURT OF OHIO APPLIED
ERRONEOUSLY THIS COURT'S GENERAL RULE SET
FORTH IN HUGHES V. OKLAHOMA, 441 U.S. 322 (1979), IN
HOLDING THAT A STATUTE WHICH CRIMINALIZES
POSSESSION OF WALLEYE LAWFULLY OBTAINED OUT-
SIDE OHIO, AND THEN BROUGHT INTO OHIO, IS NOT
AN UNCONSTITUTIONAL INTERFERENCE WITH INTER-
STATE AND FOREIGN COMMERCE.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO**

Petitioner, Port Clinton Fish Company through its counsel, petitions for a writ of certiorari to review the decision and judgment of the Ohio Supreme Court in this case, entered on May 24, 1989.

**I.
OPINIONS BELOW**

The Opinion of the Ohio Supreme Court is reported at 43 Ohio St. 3d 93. The Opinion of the Ohio Court of Appeals for the Sixth District is attached as Appendix B. The Opinion of the Toledo Municipal Court is attached as Appendix C.

**II.
JURISDICTION**

The Opinion of the Ohio Supreme court was entered on May 24, 1989. The jurisdiction of this Court is invoked pursuant to U.S. Const. art. I section 8, cl. 3.

**III.
CONSTITUTIONAL PROVISIONS AND STATE
STATUTES AND REGULATIONS INVOLVED**

U.S. Const. art. I section 8, cl. 3 provides in pertinent part:

The Congress shall have the Power. . . to regulate the commerce with foreign Nations, and among the several states. . .

Ohio Rev. Code Ann. Section 1533.63 (Anderson 1986) provides in pertinent part:

No licensed commercial fisherman, or person required to have a commercial fishing license under Section 1533.34 of the Revised Code, shall take walleye . . . from Lake Erie or its tributaries . . . All fish brought into the state from another state or country shall be subject to the laws of this state.

The Ohio Admin. Code Section 1501:31-3-02 (1984) provides in pertinent part:

(A) It shall be unlawful for any person to sell, buy, transport, take, catch, or possess . . . a walleye . . . less than 15-1/2 inches in length, a walleye fillet or part fillet of a length less than 9-1/2 inches . . . (E) It shall be unlawful for any person to take, possess, sell, buy, transport, or cause to be transported a quantity, container, boat load, catch, or haul of any species of fish referred to in this rule containing more than ten percent by weight of under-size round filleted or headless fish.

IV.

STATEMENT OF THE FACTS

Petitioner Port Clinton Fish is a corporation organized under the laws of the State of Ohio, doing business as a retail and wholesale distributor of fish in Ohio. Petitioner lawfully purchased a quantity of walleye in Canada from Olmstead Foods, a Canadian company. (Walleye is a freshwater game fish and a popular food item.) These walleye were transported from Canada to petitioner's warehouse in Toledo for the purpose of distribution. On December 17, 1985, while these walleye were in the possession of the petitioner, officers from the Ohio Division of Wildlife seized the quantity of walleye. The officers determined the boxes of walleye marked "Olmstead Foods" contained forty-two percent (42%) under-sized walleye by weight. Petitioner was charged with

possession of walleye more than ten percent (10%) undersized by weight, in violation of Ohio Rev. Code Ann. Section 1533.63 and Ohio Admin. Code Section 1501:31-3-02(A).

The Toledo Municipal Court denied the defendant-appellant's Motion for Judgment of Acquittal on the basis that the effect of the Ohio Administrative Code is not an unconstitutional interference with interstate and foreign commerce without a legitimate state purpose. The matter proceeded to trial from which defendant was found guilty. The Court of Appeals for the Sixth District of Ohio affirmed. The Ohio Supreme Court affirmed, holding that with "a legitimate state purpose for the protection and propagation of wildlife in the State of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1051:31-3-02 does not violate the Commerce Clause of the United States Constitution or interfere with freedom to contract." State of Ohio v. Port Clinton Fish Co., 43 Ohio State 3d 93 (1989). (paragraph 1 of the syllabus.)

V.
REASONS FOR GRANTING A WRIT

The Ohio Supreme Court has decided this case in conflict with the Court's general test for interference with interstate commerce set forth in Hughes v. Oklahoma, 441 U.S. 322 (1979).

Ohio Rev. Code Ann. Section 1533.63 (Anderson, 1984) prohibits the commercial fishing and taking of walleye in Ohio waters. Therefore, any walleye distributed or possessed commercially in the State of Ohio must, of necessity come from waters outside the territorial boundaries of Ohio. This includes Canada, which is a major source of walleye. These walleye transported into Ohio through interstate commerce and Canada are an article of interstate commerce. See, State v. Switzer, 22 Ohio St. 2d 47 (1970).

Chapter 119 of the Ohio Revised Code allows the Division of Wildlife to issue administrative rules regulating the possession, buying, or selling of walleye. Pursuant to this, Ohio Admin. Code Section 1501:31-3-02 makes it unlawful to possess walleye less than fifteen and one-half inches in length, or a walleye fillet of a length less than nine and one-half inches. When applied to commercial fisherman, this statute relates solely to walleye originating from waters other than those within the territorial boundaries of Ohio.

Following the general test set forth in Hughes v. Oklahoma, 441 U.S. 322 (1979), these regulations are unconstitutional as applied to commercial fishermen. Hughes states this general rule at 36.

- (1) Whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) Whether the statute serves a legitimate local purpose; and if so,

(3) Whether alternative means could promote this local purpose as well without discriminating against interstate commerce. All three elements must be satisfied in order to uphold the regulation or statute.

The Supreme Court of Ohio found that the first prong of this test was met, and relied on Hosko v. Teater (Jan. 29, 1985), N.D. Ohio No. C80-542, unreported at 9. (Magistrate's Report and Recommendation adopted by Order of Court dated March 25, 1985.) In Hosko, the Federal District Court held that Section 1533.63, which bans all commercial fishing in Ohio, was constitutional because local and foreign fishing industries were affected in the same way. Neither could take walleye out of the waters of Ohio. However, the defendant disagrees with the decision of Hosko. Ohio Admin. Code Section 1501:31-3-02 does not affect local and foreign enterprise in the same manner. Since commercial fishing is prohibited in Ohio, only interstate commerce, that is, walleye from other states and Canada is affected by these regulations. Ohio Rev. Code Ann., Section 1533.63 (Anderson 1984) states in paragraph 5, "All fish brought into the state from another state or country shall be subject to the laws of this state." This is a discrimination against interstate commerce. Therefore, since these regulations are not incidental to interstate commerce, but relate solely to interstate commerce, Ohio Admin. Code Section 1501:31-3-02 fails to meet the first requirement of the Hughes test.

In discussing the second element of the Hughes test, the Ohio Supreme Court states:

Obviously, the purpose of the statute and regulation is protection and conservation of wildlife, a legitimate state interest. State v. Port Clinton Fish Co. at 95.

The defendant agrees that the protection and conservation of wildlife within the boundaries of Ohio is a legitimate state interest, but the wildlife affected by these regulations, in this case, is from Canada. Justice Holmes clearly states this intent to regulate Canadian walleye in his concurrence. He states:

The availability of the greatest number of walleye for sport fishing depends not only upon the manner of the control and management of the species in the American portion of the waters of Lake Erie, but also upon the control and protection of walleye in Canadian waters.

He states further:

Obviously, Ohio authorities may not mandate the reasonably necessary wildlife management provisions to be applied in Canadian waters. The next best approach then is, as was done here, to apply regulations to the species which are brought into Ohio.

This is just an indirect way to regulate Canadian and other states' fish, and does not constitute a legitimate state purpose. The walleye possessed by petitioner are not from Ohio, but are from Canada. Therefore, since when applied to commercial fishermen, Ohio Admin. Code Section 1501:31-3-02(A) and (E) do not affect walleye originating from Ohio waters, no legitimate local purpose is served, and the second prong of the Hughes test is not met¹.

The Supreme Court of Ohio also found that the third prong of the Hughes test was met, by stating:

Requiring that Ohio fish distributors observe a regulation clearly designed to ensure a plentiful walleye population in the future (and allowing these parties a ten percent (10%) 'margin of error') is a feasible and practical way of accomplishing the intended goal. State v. Port Clinton Fish Co. at 95.

¹. A review of statutes of the states that border Lake Erie demonstrates the inconsistency of regulation. Pennsylvania allows the purchase or sale of fish legally taken from waters outside the state. 30 Pa. Cons. Stat. Ann. Section 3311 (a) (Purdon Supp. 1989). New York allows the importation of walleye without respect to size. N.Y. Fish and Wildlife Law Section 11-1703 (McKinney 1984). Michigan allows the importation of walleye if lawfully captured under the laws of the state or country where caught. Mich. Comp. Laws Ann. Section 308.14 (West 1984).

However, there is no logical reason to require Ohio fish distributors to observe a size limit regulation which will ensure a walleye population for Ohio in the future when these fishermen do not take fish out of the waters of Ohio. It is true that Ohio shares a common border with Canada across Lake Erie, however, there is no proof the subject fish came from Lake Erie. Also, the regulation purports to criminalize possession of all undersized walleye even if caught in Western Canada or in lakes other than Lake Erie. Regulating the sizes of walleye from Manitoba does not "ensure a plentiful walleye population in the future" in Ohio.

Furthermore, there already are alternative means to promote Ohio's purpose of ensuring a future walleye population. The most obvious is Ohio Rev. Code Ann. Section 1533.63 (Anderson 1986) banning commercial fishing of walleye, and although the Ohio Supreme Court disagrees, State v. Port Clinton Fish Co., 43 Ohio St. 3d at 95, the recordkeeping provisions of Ohio Rev. Code Ann. Section 1533.63 ensure that walleye sold commercially in Ohio do not come from Ohio water, which means the size of the walleye is of no local interest to Ohio.

Also contrary to the Ohio Supreme Court, State v. Port Clinton Fish Co. at 95, the intrusion on the affected parties and interstate commerce is not "de minimus." In order to buy and sell walleye, Ohio distributors must contract with fishermen from other states and Canada. These fishermen legally catch a product, but are unable to sell it to Ohio distributors, and Ohio distributors are prevented from acquiring a valuable product. These other means, the banning of commercial fishing of walleye in Ohio waters, and the strict recordkeeping provision, could promote Ohio's local purpose of ensuring a future walleye as well or better than regulations restricting the size of walleye imported into Ohio through interstate commerce.

Since Ohio Admin. Code Section 1501:31-3-02, when applied to commercial fishermen, relates only to interstate commerce, its effects are not incidental. The regulation serves no legitimate local purpose when applied to commercial fishermen because they are prohibited from taking walleye out of the waters of the State of Ohio. There are alternative means of preserving the walleye population in Ohio, such as banning commercial fishing of walleye. Therefore, this regulation does not meet the three prong test of Hughes.

This case presents an important federal issue regarding Ohio's interference with the interstate transportation and sale of walleye. The challenged regulations allow the State of Ohio to regulate the size limits of fish harvested in other states and Canada. Since these walleye are not from Ohio waters, Ohio has no local interest in their protection. This case has set a precedent of allowing one state to regulate wildlife that comes only from other states and Canada, in violation of U.S. Const., art. 1, section 8 cl.3.

VI. CONCLUSION

The petition for a writ of certiorari should be granted.

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**THE STATE OF OHIO APPELLEE, v. PORT CLINTON
CLINTON FISH COMPANY, APPELLANT.**

[Cite as State v. Port Clinton Fish Co.
(1989), 43 Ohio St. 3d 93.]

*Criminal law — Possession of undersized walleye — R.C. 1533.63
and Ohio Adm. Code 1501:31-3-02(A) are constitutional under
Commerce Clause.*

With a legitimate state purpose for the protection and propagation of walleye in the state of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1501:31-3-02 does not violate the Commerce Clause of the United States Constitution or interfere with freedom to contract.

(No. 88-258—Submitted March 8, 1989—
Decided May 24, 1989.)

Appeal from the Court of Appeals
for Lucas County, No. L-87-148.

Appellant, Port Clinton Fish Company ("Port Clinton"), indisputably, is an Ohio corporation engaged in both retail and wholesale distribution of fish. On December 17, 1985, Ohio Division of Wildlife officers entered appellant's facility in Toledo and inspected seven boxes of walleye fillets. The boxes were labelled "Olmstead Foods," and were allegedly purchased from a Canadian company. Upon inspection, the officers determined that the boxes contained forty-two percent "undersized" walleye by weight. The fish were seized and appellant company was charged with possession of walleye "more than 10% undersize[d] by weight" in violation of R.C. 1533.63 and Ohio Adm. Code 1501:31-3-02(A).

APPENDIX A

After trial in the Toledo Municipal Court, appellant was found guilty and appealed that judgment to the court of appeals. The appellate court affirmed, holding that R.C. 1533.63 and Ohio Adm. Code 1501:31-3-02 do not represent an unconstitutional interference with or burden on interstate commerce. Further, the court of appeals ruled that enforcement of the regulations did not abridge appellant's right to contract.

The case is now before this court pursuant to the allowance of a motion for leave to appeal.

Mark S. Schmollinger, assistant prosecuting attorney, *Anthony J. Celebrezze, Jr.*, attorney general, and *John McManus*, for appellee.

Connelly, Soutar & Jackson, *Reginald S. Jackson, Jr.*, and *Steven R. Smith* for appellant.

Hoffman, J.

I.

As amended in 1984, R.C. 1533.63 prohibits commercial fishing of walleye within the boundaries of the state of Ohio, and furthermore states that "walleye * * * originating from outside of this state may be possessed for sale, bought, or sold subject to the orders of the division of wildlife." Prior to its amendment in 1984, R.C. 1533.63 explicitly regulated undersized walleye along with other fish such as yellow perch, catfish, etc. Now the same "undersize" restrictions pertaining to walleye that were in R.C. 1533.63 are codified in Ohio Adm. Code 1501:31-3-02, legal length and weight of certain fish.

That regulation provides in pertinent part:

"Under authority of section 1533.63 of the Revised Code and division (D) of section 1531.08 of the Revised Code, the chief of the division of wildlife hereby orders that throughout the state:

"(A) It shall be unlawful for any person to sell, buy transport, take, catch, or possess * * * a walleye * * * less than fifteen and one-half inches in length, *a walleye fillet or part fillet of a length less than nine and one-half inches* * * * "

* * *

(E) It shall be unlawful for any person to take, possess, sell, buy, transport, or cause to be transported, a quantity, container, boat load, catch or haul of any species of fish referred to in this rule *containing more than ten percent by weight of undersized round, filleted or headless fish.*"
(Emphasis added.)

The issue, herein is whether the subject regulations, which criminalize the possession of undersize walleye, are violative of the Commerce Clause of the United States Constitution. Because R.C. 1533.63 now prohibits commercial fishing of walleye in Ohio waters, all such fish traded commercially in the state must of necessity be caught outside Ohio.

The test we employ has been circumscribed by the United States Supreme Court as follows:

"* * * (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma* (1979), 441 U.S. 322, 336.

The elements of the above test must be met in the conjunctive if the regulation being examined are to be upheld.

Turning to the first prong of the *Hughes* test, we find the challenged regulations are "evenhanded" in that they neither favor local enterprise nor facially discriminate against interstate

commerce. In reviewing precisely the same regulations as are presently before us, the United States District Court noted:

"The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fisherman who may market their walleye in Ohio without local competition." *Hosko v. Teater* (Jan. 29, 1985), N.D. Ohio No. C80-542, unreported, at 9. (Magistrate's report and recommendation adopted by order of court dated March 25, 1985.)

The instant regulations meet the first element of the *Hughes* test.

We need not dwell on the second element of the *Hughes* test. Obviously, the purpose of the statute and regulations is protection and conservation of wildlife, a legitimate state interest. Appellant's contention that "these regulations * * * have the effect of erecting a trade barrier" is without merit.

The third element of the *Hughes* test considers whether alternative means could promote the "local purpose" as well without infringing in any manner upon interstate commerce. Port Clinton maintains that since amended R.C. 1533.63 forbids commercial fishing of walleye in Ohio, it is superfluous to burden Ohio's fish distributors with length-limit regulations. Appellant further contends that the record-keeping provisions of R.C. 1533.63 (sales, purchases, and labelling) serve the identical purpose of Ohio Adm. Code 1501:31-3-02 and together with the ban render said regulations unnecessary.

With the primary purpose of the length limitations being the protection of immature walleye, we see no better, *i.e.*, less intrusive, means for the propagation of the species than the instant regulatory mechanism. Requiring that Ohio fish distributors observe a regulation clearly designed to ensure a plentiful walleye population in the future (and allowing these parties a ten-percent "margin of error") is a feasible and practical way of accomplishing the intended goal. Additionally, the intrusion upon the affected parties (Ohio fish distributors) and the flow of commerce is *de minimis*.

Applying the *Hughes* standard, the instant regulations do not contravene the Commerce Clause of the United States Constitution. See *State v. Millington* (Fla. 1979), 377 So 2d 685, where in an identical situation (defendant in violation of possessing undersize shrimp) the Florida Supreme Court ruled the pertinent state statute not unconstitutional on Commerce Clause grounds.

II.

Finally, appellant argues in the alternative that the instant regulations disrupt the "right to contract." Appellant provides no persuasive authority to support its position. Simply put, appellant is permitted to contract for the purpose and sale of legal size walleye with any party it desires.

We conclude by holding that with a legitimate state purpose for the protection and propagation of walleye in the state of Ohio as its basis, and only minimal intrusion on the affected parties, Ohio Adm. Code 1501:31-3-02 does not violate the Commerce Clause of the United States Constitution or interfere with freedom to contract.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT
and H. BROWN, JJ., concur.
JOHN R. HOFFMAN, J., of the Fifth Appellate District, sitting
for RESNICK, J.

HOLMES, J., concurring. In wholeheartedly concurring I believe it to be important to point out in support of the legitimate state purpose of such regulations some additional factors. The propagation and managment of walleye for the recreational taking of this fish in the waters of Lake Erie has proven to be a great asset to the state of Ohio, not only to the angler, but also to those serving the needs of this great outdoor sport—such as boat and motor sales and servicing, tackle dealers, marinas, restaurants, charters, and many others.

The availability of the greatest number of walleye for sport fishing depends not only upon the manner of the control and managment of the species in the American portion of the waters of Lake Erie, but also upon the control and protection of walleye in Canadian waters. The mobility of walleye from one side of Lake Erie to another, crossing the international boundary, is a well-known fact of aquatic biology. It follows that the amounts and size of fish taken in the Canadian portion of Lake Erie directly affects the number of the species available for Ohio sportsmen.

Obviously, Ohio authorities may not mandate the reasonably necessary wildlife mangement provisions to be applied in Canadian waters. The next best approach then is, as was done here, to apply regulations to the species which are brought into Ohio.

The majority's position can simply be supported here to show that there is a real and legitimate purpose in promulgating the Department of Natural Resources' regulations for the protection and propagation of walleye.

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

C.A. NO. L-87-148

State of Ohio
APPELLEE
-VS-

Port Clinton Fish Company
APPELLANT

APPEAL FROM
TOLEDO MUNICIPAL COURT
NO. CRB 86-11441

DECISION AND
JOURNAL ENTRY

DATE December 18, 1987

This case is before this court on appeal from a judgment of the Toledo Municipal Court.

Appellant, the Port Clinton Fish Company, was charged with unlawfully possessing undersized walleye fish in violation of R.C. 1533.63 and O.A.C. Rule 1501:31-3-02(A).

On March 19, 1987, appellant appeared with counsel for trial in Toledo Municipal Court. The state of Ohio and appellant stipulated that on December 17, 1985, officers of the Ohio Fish and Game Department entered the Port Clinton Fish Company located at 1949 Broadway, Toledo, Ohio. The officers entered the cutting room and observed seven (7) boxes of walleye fish marked I.Q.F. The fish in the boxes were walleye fillets allegedly from Olmstead Foods of Canada. Upon a complete inspection, it was determined that the boxes contained forty-two (42) percent undersized walleye.

APPENDIX B

Appellant moved for a judgment of acquittal on the basis that the statute and the regulation are in violation of the Ohio and United States Constitutions. The court found the motion for a judgment of acquittal not well taken and found appellant guilty. Appellant was fined \$100 and costs. It is from that judgment which appellant filed a timely notice of appeal asserting the following as his sole assignment of error:

"The trial court erred in denying the motion of defendant for acquittal."

In essence, the appellant in contending that a regulation which criminalizes the possession of walleye lawfully obtained outside Ohio is an unconstitutional interference without due process of law. Similar issues have been considered and found without merit by this court in State v. Rohr Fish Co. (April 10, 1981), Lucas App. No. L-80-260, unreported. However, the Rohr case was decided prior to the amendment of R.C. 1533.63 wherein commercial fishing of walleye was banned in Ohio. Hence, there remains an issue to be resolved by this court as to whether the banning of commercial fishing of walleye necessitates the overruling of Rohr, supra. All of the other issues raised by appellant have been considered and decided many times by this court. O.A.C. 1501:31-3-02 was considered by this court in Dept. Of Natural Resources v. White's Landing Fisheries, Inc. (Sept. 27, 1985), Erie County App. No. E-85-10, unreported. While the issue in that case involved yellow perch, this court considered the rule in its entirety and found that Ohio Adm. Code 1501:31-3-02 is a valid and enforceable regulation. We reaffirm that holding today as it applies to walleye and the prescribed length requirements.

We now proceed to consider whether the amendment to R.C. 1533.63 banning commercial fishing of walleye renders the statute unconstitutional. The Ohio Supreme Court in State v. Switzer (1970), 22 Ohio St. 2d 47, discussed a state's right to pass laws which indirectly affect interstate commerce wherein the court stated at 55:

"This is apparent from an examination of Section 854, Title 16, U.S. Code, which reads:

"'Nothing in this Act [Sections 851-856] shall be construed to prevent the several states and territories from making or enforcing laws or regulations not inconsistent with the provisions of this Act, or from making or enforcing laws or regulations which shall give further protection to black bass and other fish.'

"Applying the federal statutes, we find that under Section 852b, Title 16, U.S. Code, Ohio's statutes cover fish brought into the state once the fish are within the state 'for use, consumption, sale or storage therein * * *'"¹

Hence, states have authority to pass laws which give further protection to fish as long as such laws meet the requirements set forth in Hughes v. Oklahoma (1979), 441 U.S. 322. The court in Hughes, supra, stated that such statutes must meet the following test:

"* * * (1) whether the challenged statutes regulate evenhandedly with only 'incidental' effects on interstate commerce, or discriminate against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." Id. at 336.

R.C. 1533.63 was considered by the court in Hosko v. Teater (N.D. Ohio Jan. 29, 1985), No. C80-542, unreported. In that case the court stated, while addressing the commerce clause,

"In general, the Commerce Clause not only empowers Congress to legislate concerning interstate commerce, but has long been held to also act as a bar to state actions which would discriminate against or unreasonably burden interstate commerce. See Minnesota v. Cloverleaf Creamery, 449 U.S. 456 (1981); Hughes, supra. State legislation which amounts to mere economic protection is almost per se invalid. Philadelphia v. New Jersey, 437 U.S. 617 (1978). In addition, legislation with otherwise valid purposes is also subject to being invalidated if it unreasonably burdens interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

"The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fishermen who may market *their walleye in Ohio without local competition.

"(*Such out-of-state commercial fishermen can sell walleye in Ohio provided that they meet the legal length requirements imposed by Ohio law (Mosley Dep. p. 51; Mosley Aff.. ¶13).)

"However, a finding that the restrictions in issue operate 'evenhandedly' does not terminate the inquiry into their burden upon interstate commerce. As the Supreme Court, in Pike v. Bruce Church, Inc., *supra*, stated:

"Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits . . . the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

"397 U.S. at 142.

"The burden on interstate commerce here is conformity with the fish length requirements governing the legal importation of certain species of fish into the State of Ohio. The state's interest in promulgating such requirements is its law enforcement interest. These requirements do not directly affect or protect Ohio walleye or other Ohio species of fish except insofar as they aid in the enforcement of the restrictions imposed upon commercial fishing in Ohio (Mosley Dep. p. 191; Scholl Aff. ¶16). By regulating the importation and sale of walleye and other species of fish, the State of Ohio seeks to prevent circumvention of its law. This is a legitimate state interest. Andrus v. Allred, 444 U.S. 51 (1979); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936). As a result,

plaintiffs' Commerce Clause challenge to the restrictions in issue must fail."
(Emphasis added.)

From this it can readily be seen that a ban on walleye fishing by commercial fishermen does not give Ohio residents preferential treatment at the expense of non-residents. In addition, the only means of protecting the fish of Ohio is to apply the same law to all undersized walleye fish being possessed in Ohio regardless of its origin. It is a legitimate exercise of police power within the state. The rationale of the exercise of such power is that it operates as a shield against covert depletion of the local supply, thus tending to effectuate the policy of the law by rendering evasion of it less easy. See Bayside Fish Flour Co. v. Gentry (1936) 297 U.S. 422.

Thus, the ban on commercial fishing of walleye in Ohio does not change our holding in State v. Rohr, supra, in any way. We hold that R.C. 1533.63 and O.A.C. 1501:31-3-02 are not violative of the interstate commerce clause and thus do not violate appellant's constitutional rights under the Ohio and United States Constitutions.

In addition, appellant's right to contract is not abridged without due process of law in that R.C. 1531.08 authorizes the Chief of the Division of Wildlife, Department of Natural Resources to make regulations regarding the taking and possessing of wildlife and the Supreme Court has determined that the Chief is acting in a legislative capacity when so doing. Switzer, supra. Further, appellant is permitted to contract for the purchase of legal size walleye from anyone outside the state of Ohio.

Accordingly, appellant's sole assignment of error is found not well-taken.

On consideration whereof, substantial justice was done the party complaining and the judgment of the Toledo Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J.

Alice Robie Resnick, J.

George M. Glasser, J.

CONCUR.

PRESIDING JUDGE

JUDGE

JUDGE

¹ Although 16 U.S.C. 854 has been repealed, the rationale in Switzer, supra, still applies. See 16 U.S.C. 3378.

STATE OF OHIO

V.

PORT CLINTON FISH CO. JUDGMENT ENTRY
CRB86-11441
 JUDGE Denise Ann Dartt

March 19, 1987

Case called for trial. State present. Defendant present with counsel. Both Defendant and State enter into stipulations of fact, venue and I.D. of Defendant.

Defendant moves for judgment of acquittal. Upon consideration of Defendant's argument, including the argument of unconstitutionality of the Statute and State's response thereto, the motion for judgment of acquittal is found not well taken and same is hereby denied.

Defendant found guilty. Fine of \$100.00 and costs. Stay on fine and costs to 4/20/87.

/s/Denise Ann Dartt
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Martin Hosko, et al.,
Plaintiffs

C 80-542

vs.

Magistrate's Report
and Recommendation

Robert Teater, et al.,
Defendants

This is an action for declaratory, injunctive, and monetary relief commenced under 42 U.S.C. §1983, the Fourteenth Amendment, the Supremacy Clause, and the Commerce Clause of the Constitution. Pending are cross-motions for summary judgment. Upon review of those motions, the parties' memoranda addressing the issues raised therein, and the materials submitted for review, I have concluded that defendants' motion for summary judgment should be granted, and that plaintiffs' motion should be denied.

This action was instituted to challenge the constitutionality of the regulations governing the sale, purchase, transportation, taking, and possession of fish within the State of Ohio. Specifically, plaintiffs challenge the constitutionality of §1533.63 of the Ohio Revised Code, and Ohio Division of Wildlife Regulation 1501:31-3-02. These provisions ban commercial fishing for walleye in the State of Ohio, and place length and weight restrictions upon certain species of fish which may be taken within the State.

APPENDIX D

I. ABSTENTION

In their memoranda, defendants contend that this court should abstain from exercising its jurisdiction in this cause. In making this contention, defendants suggest that abstention is required under the standards announced in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Younger v. Harris, 401 U.S. 37 (1971). In examining the defendants' contentions under all of these standards, I do not find myself in agreement that abstention is required.

Abstention permits federal courts to decline or postpone the exercise of the general grant of jurisdiction set forth in Article III of the Constitution. See Puillman, *supra*. When so exercised, the doctrine allows a state court the opportunity to decide the matters at issue in the federal forum. See Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, *reh'g denied*, 426 U.S. 912 (1976). However, abstention is an extraordinarily narrow exception to the duty of federal courts to adjudicate controversies, and the Supreme Court has emphasized that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* Indeed, such a procedural posture is justified only where the "order to the parties to repair to the state court would clearly serve an important countervailing interest." *Id.*

As aptly pointed out by the defendants, the Supreme Court has delineated three categories of abstention. See Colorado River Conservation District, *supra*, 424 U.S. at 814. Each category represents a set of circumstances which justifiably permit federal courts to decline to adjudicate cases which are otherwise properly before them. Defendants contend that such circumstances exist in this cause.

In making this contention, the defendants rely in part upon the first and oldest form of abstention, created in Railroad Comm'n v. Pullman Co., *supra*. There the Supreme Court held that abstention may be appropriate when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. 312 U.S. at 501. By abstaining in such cases, federal courts avoid unnecessary adjudication of federal questions and "needless friction with state policies . . ." *Id.* However, for such deferral to be appropriate, the state law issue present must exhibit qualities of uncertainty and ambiguity. See Wisconsin v. Contantineau, 400 U.S. 433, 438-39 (1971); Colorado River Conservation District, *supra*, 424 U.S. at 815.

In this case there is no uncertain question of state law; hence, the Pullman doctrine is inapplicable. The statutory provision in issue is clear, and states in no uncertain terms the length requirements for the legal taking and possession of the various species of fish in issue. In addition, Ohio Division of Wildlife Regulation 1501:31-3-02 repeats these restrictions in no uncertain terms with the addition of a commercial ban upon the taking of walleye. This regulation, as promulgated by the Chief of the Ohio Division of Wildlife, is fully within the authority delegated to him by the Ohio General Assembly which has granted him "authority and control in all matters pertaining to the protection, preservation, propagation, possession, and management of the wild animals." O.R.C. §1531.08. Within this grant of authority, the Chief may regulate the "[t]aking, possession, transportation, buying, selling, offering for sale, and exposing for sale commercial fish or any part thereof, including species taken, length, weight, [a]nd method of taking. . ." O.R.C. 1531.08(D). No other statutes or regulations conflict with these provisions; nor has any enactment been called to my attention which would suggest that these provisions do not mean exactly what they say. Since there is no uncertain question of state law, and the simple question in this case is whether the provisions are unconstitutional, abstention pursuant to Pullman is not required. See Contantineau, *supra*, 400 U.S. at 439.

The second category of abstention stems from Younger v. Harris, *supra*. Under the Younger doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests. In Middlesex Ethics Comm'n v. Garden State Bar Assn., 457 U.S. 423, 432-37 (1982), the Supreme Court enunciated a three-prong test for determining when Younger abstention is appropriate in noncriminal proceedings. This test requires a federal court to inquire 1) whether there are ongoing state proceedings; 2) whether such proceedings implicate important state interests; and 3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. United States v. Anderson, 705 F.2d 184, 188 (6th Cir. 1983). Such abstention is required however, only when state court proceedings have been commenced "before any proceedings of substance on the merits have taken place in the federal courts." Hicks v. Miranda, 422 U.S. 332, 349 (1975). See also Hawaii Housing Authority v. Midkiff, ___ U.S. ___ 104 S. Ct. 2321, 2328, (1984). In all other cases a federal court must fulfill its normal duty to adjudicate federal questions properly brought before it. See *id.*, at ___, 104 S. Ct. 2328.

A review of the materials submitted in conjunction with the docket in this cause reveals that this action was instituted prior to the commencement of any state court proceedings between the parties involved herein. Plaintiffs filed their complaint in this cause on August 28, 1980. Thereafter, on October 30, 1981, the State of Ohio instituted an action in the Court of Common Pleas for Lucas County, Ohio, against a number of the plaintiffs seeking equitable relief and monetary damages from them for allegedly violating the regulations in issue in this cause.* At that time, discovery was merely beginning,

* Numerous other actions against the remaining plaintiffs were also instituted by the State of Ohio in Ohio courts at approximately the same time (Dft's mem. in support of summary judgment, pp. 5-6).

and the summary judgment cut-off date had been established. In short, this cause had not yet proceeded beyond its embryonic stage. As a result, upon this basis alone, considerations of economy, equity, and federalism favor Younger abstention.

However, the application of the three prong test for determining when Younger abstention is appropriate does not support such abstention. At this late date, counsel for the defendants have neither established nor even suggested that any of the state proceedings remain ongoing.* This is required by the first prong of the test governing the applicability of Younger abstention. Therefore, at this point, this case does not fall within the standard abstention promulgated in Younger, supra.

The final category of abstention relied upon by the defendants is derived from Burford v. Sun Oil Company, 319 U.S. 315 (1943). In Burford the Supreme Court outlined two factors which justify abstention. First, a complex state regulatory scheme must be present which would be disrupted by federal court review; and second, a state created centralized forum of special competence in the particular subject area must exist. Id. at 332-33. In the present case, an arguably complex state regulatory scheme is present which is operated by the State of Ohio Division of Wildlife. However, no centralized forum of special competence has ever been created or exists to administratively or judicially deal with challenges to wildlife regulations and their respective application in individual cases. As a result, application of Burford abstention is also inappropriate.

* Such a showing is crucial to the exercise of Younger abstention which need only be employed where federal intervention would cause interference with state proceeding. J. P. v Desanti, 653 F.2d 1080 (6th Cir. 1981).

II.

RES JUDICATA

In the memoranda attached to their motion, the defendants contend that plaintiffs' action is barred by the doctrine of res judicata. Under that doctrine, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were raised in that action. See Allen v. McCurry, 449 U.S. 90, 94 (1980). This doctrine applies with equal force in suits like the present one where a plaintiff's cause of action is premised upon any of the Civil Rights Acts. See Allen, supra, 449 U.S. 104-105.

A review of the materials submitted by the defendants in support of this portion of their motion clearly reveals that the plaintiffs have, on numerous occasions, challenged the constitutionality upon due process and equal protection grounds of the statutory and regulatory provisions in issue.* (See State ex rel. Tank v. Teater, att. to deft's mem. as App's 5, 6 and 7; State of Ohio v. Rohr Fish Co., supra, App's 14 and 15; State of Ohio v. Port Clinton Fisheries, supra, App 16). As a result, the plaintiffs are now barred from pursuing such claims in this court. See Brown v. Felson, 442 U.S. 127, 131 (1979); Silcox v. United Trucking Service, Inc., 687 F.2d 848, 852 (6th Cir. 1982); Harrington v. Vandalia-Butler Board of Education, 649 F.2d 434, 437 (6th Cir. 1981).

A similar result, however, does not follow in regard to plaintiffs' claims pursued under the Commerce and Supremacy Clauses of the Constitution. It does not appear that the plaintiffs have ever fully or fairly litigated these claims. As a result, this court must necessarily reach a decision regarding their merits. See Winters v. Lavine, 574 F.2d 46, 56 (2d Cir. 1978).

* Each plaintiff has either actually done so, or via the doctrine of virtual representation has, in effect, done so. See Montana v. United States, 440 U.S. 147 (1979).

III.

COMMERCE CLAUSE

In their complaint, plaintiffs allege that O.R.C. §1533.63 and Ohio Division of Wildlife Regulation 1501:31-3-02 place an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution (Compl. ¶18). Were it not for the Supreme Court's decision in Hughes v. Oklahoma, 441 U.S. 322 (1979), plaintiffs' allegation would merit little more than cursory consideration. In Hughes, supra, however, the Supreme Court explicitly brought state fish and game laws and regulations within the purview of the Commerce Clause. Overruling Geer v. Connecticut, 161 U.S. 519 (1896), the Court disapproved of the previously well established common law legal fiction of state ownership of wild fish and game. The Court recognized that conservation and protection of wild animals is a legitimate state interest, and held that "States may promote this legitimate [interest] only in ways consistent with the basic principle that our economic unit is the nation." Hughes, supra, 441 U.S. at 33 (quoting H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949)).

In general, the Commerce Clause not only empowers Congress to legislate concerning interstate commerce, but has long been held to also act as a bar to the state actions which would discriminate against or unreasonably burden interstate commerce. See Minnesota v. Cloverleaf Creamery, 449 U.S. 456 (1981); Hughes, supra. State legislation which amounts to mere economic protection is almost per se invalid. Philadelphia v. New Jersey, 437 U.S. 617 (1978). In addition, legislation with otherwise valid purposes is also subject to being invalidated if it unreasonably burdens interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 187 (1970).

The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fishermen who may market their walleye in Ohio without local competition.*

However, a finding that the restrictions in issue operate "evenhandedly" does not terminate the inquiry into their burden upon interstate commerce. As the Supreme Court, in Pike v. Bruce Church, Inc., *supra*, stated:

Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits . . . the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

* Such out-of-state commercial fishermen can sell walleye in Ohio provided that they meet the legal length requirements imposed by Ohio law (Mosley Dep. p.51; Mosley Aff. ¶13).

The burden of interstate commerce here is conformity with the fish length requirements governing the legal importation of certain species of fish into the state of Ohio. The state's interest in promulgating such requirements is its law enforcement interest. These requirements do not directly affect or protect Ohio walleye or other Ohio species of fish except insofar as they aid in the enforcement of the restrictions imposed upon commercial fishing in Ohio (Mosley Dep. p. 191; Scholl Aff., ¶16). By regulating the importation and sale of walleye and other species of fish, the State of Ohio seeks to prevent circumvention of its law. This is a legitimate state interest. Andrus v. Allred, 444 U.S. 51 (1979); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936). As a result, plaintiffs' Commerce Clause challenge to the restrictions in issue must fail.

IV.

SUPREMACY CLAUSE

Plaintiffs' Supremacy Clause challenge to the fishing restrictions in issue is also lacking in merit. I can perceive of no conflict between those restrictions and the Great Lakes Fishing Act of 1956, 16 U.S.C. §931 et. seq. There is nothing in that Act relating to size or species restrictions for fish, and the Act specifically permits states to make and enforce regulations which do not conflict with those contained in the Act. See 16 U.S.C. §939b. As a result, plaintiffs' constitutional challenge premised upon the Supremacy Clause should be rejected.

CONCLUSION

Therefore, for all the foregoing reason, it is hereby RECOMMENDED that defendants' motion for summary judgment be granted, and that plaintiffs' motion be denied.

/s/James Carr
United States Magistrate